

FEB 1 1947

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 717.

EDWIN B. H. TOWER, JR.,

Petitioner,

VS.

WATER HAMMER ARRESTER CORP.,

Respondent.

PETITION FOR REHEARING.

Since the filing of the petition herein, a decision of another Circuit Court of Appeals has been reported which adds to the conflict of decisions and gives further impetus to the growing state of confusion, for the correction of which the writ in this case is sought. In the light of this new development, petitioner respectfully prays this Court for rehearing of the petition and reconsideration of its order of January 13, 1947, denying the same.

The question presented by the petition is whether a Federal court has jurisdiction to adjudicate the validity of a patent in a case where there is no justiciable controversy between the parties because the patentee has conceded that his adversary has not infringed.

That question has been answered in the negative by the Court of Appeals for the Second Circuit in *McCurrach v. Cheney*, 152 F. (2) 365. The question was answered in the affirmative by the Court of Appeals for the Seventh Circuit in the case at bar.

Since the filing of the petition for certiorari in this case, the decision of the Court of Appeals for the Ninth Circuit in *Heer v. Linstrom* has been published. It is found in 158 F. (2) 93 (Advance Sheet, January 20, 1947). That was an infringement suit in which the District Court entered a judgment that there was no infringement and that the patent was invalid. Plaintiff appealed, and upon the appeal, conceded that the District Court's holding of non-infringement was correct. The Court thereupon concluded that there was no longer any case or controversy between the parties, and ordered the action dismissed, saying:

“The original basis for the cause being withdrawn, and there remaining no support for the issue of invalidity, this Court does hereby remand the case to the District Court with instructions that the judgment be set aside, and that the action be dismissed.”

Thus, the Court of Appeals for the Ninth Circuit has held that, in the absence of a justiciable controversy on the question of infringement, the Court is without jurisdiction to adjudicate the question of validity. This holding is in agreement with the decision of the Court of Appeals for the Second Circuit in *McCurrach v. Cheney*, 152 F. (2) 365, and is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in the case at bar.

The ruling of the Court of Appeals for the Second Circuit upon the question presented in the petition, which your petitioner submits is the correct ruling, has spread clear across the nation to the Ninth Judicial Circuit, leaving the Seventh Circuit as the only one taking an opposite view.

The law upon this question of Federal jurisdiction is now in a growing state of confusion. If it be not promptly straightened out by this Court, irreparable injury may be done to litigants who are uncertain of their rights by Courts who are uncertain of their duties.

The Constitutional limitation upon the jurisdiction of the Federal Courts is national in extent and cannot be left for determination on geographical lines. In the circumstances here presented, the duty apparently devolves upon this Court to put an end to the conflict and to establish the law, once and for all, that must be applied uniformly in all the circuits.

Your petitioner, therefore, most urgently prays this Court to review the petition for certiorari in this case and, upon consideration of the foregoing, to vacate its order denying the same and issue a new order granting the writ.

Respectfully submitted,

HAROLD OLSEN,

Counsel for the Petitioner.

I hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay, and that the same is well founded in fact and in law, and should be granted.

HAROLD OLSEN,

Counsel for the Petitioner.